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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

MING H. DONG,

Defendant and Appellant.

B218644

(Los Angeles County  
Super. Ct. No. LA060770)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Susan M. Speer, Judge. Affirmed as modified.

Katherine Eileen Greenebaum, under appointment by the Court of Appeal,  
for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth C.  
Byrne and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Ming H. Dong of attempted rape, with a finding he personally used a deadly weapon. The court sentenced defendant to four years in state prison. On appeal, defendant contends and the People acknowledge the penalty assessment imposed under Government Code section 76104.7 should be stricken. We agree and strike the \$20 penalty assessment and affirm the judgment as modified.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Defendant was hired by the parents of the 24-year-old victim, as a live-in caretaker for the victim's grandfather, who had suffered a stroke. When the parents were away, defendant entered the victim's bedroom and attempted to rape her at knifepoint. She screamed and struggled. Defendant suddenly stopped and left the bedroom. The victim telephoned police.

Defendant was arrested and charged by information with attempted rape (Pen. Code, §§ 261, subd. (a)(2); 664). The information specially alleged defendant had personally used a deadly weapon (a knife) within the meaning of Penal Code section 12022, subdivision (b)(1). The jury convicted defendant as charged and found true the weapon enhancement allegation.

The trial court sentenced defendant to four years in state prison, the middle term of three years for attempted rape, plus one year for the weapon enhancement. The court ordered defendant to pay a \$30 security fee, a \$30 criminal assessment fee, an \$800 restitution fine and a \$20 DNA penalty assessment. The court imposed and suspended a parole revocation fine pursuant to Penal Code section 1202.45.

### **DISCUSSION**

Defendant contends the trial court erred in imposing a \$20 DNA penalty assessment under Government Code section 76104.7. The People agree. Government Code sections 76104.6 and 76104.7 provide penalties to be assessed on other fines, penalties, or forfeitures, with the assessments being deposited into the DNA Identification Fund. However, the penalties do not apply to the restitution fine and court security fee imposed by the court here (Gov. Code, §§ 76104.6, subd. (a)(3), 76104.7,

subd. (c); *People v. Valencia* (2008) 166 Cal.App.4th 1392, 1396), and there was no other fine, penalty or forfeiture on which the DNA assessment could be made. Thus, the \$20 DNA penalty assessment must be stricken.

### **DISPOSITION**

The \$20 DNA penalty assessment is stricken. The clerk of the superior court shall prepare an amended abstract of judgment so reflecting. In all other respects the judgment is affirmed.

**WOODS, Acting P. J.**

**We concur:**

**ZELON, J.**

**JACKSON, J.**